No. 89-152

In the Supreme Court of the United States

OCTOBER TERM, 1989

VERA M. ENGLISH, PETITIONER

v.

GENERAL ELECTRIC COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851, which provides a federal administrative remedy for employees who suffer employment discrimination in retaliation for making nuclear safety complaints, preempts an employee's state law tort claim based on such retaliation.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner was employed as a laboratory technician at respondent's nuclear fuels production facility in Wilmington, North Carolina, from 1972 to 1984, when her employment was terminated (Pet. App. 2a, 7a). In this diversity action, petitioner contends that respondent retaliated against her for making nuclear safety complaints, and asserts a state law claim for intentional infliction of emotional distress (*id.* at 6a).

1. In February 1984, petitioner complained to respondent's management and to the Nuclear Regulatory Commission about a number of perceived violations of nuclear safety standards at the Wilmington facility, including the alleged failure of her co-workers to clean up spills of radioactive materials in the laboratory (Pet. App. 2a, 7a-8a).[1] Frustrated with her employer's failure to address her concerns, petitioner, on one occasion, deliberately failed to clean a work table contaminated with a uranium solution, and instead outlined the contamination with red tape to bring the matter to the other workers' attention (*id.* at 2a, 8a). A few days later, petitioner showed her supervisor the marked-off areas (which had not been cleaned in the interim), and as a result laboratory work was halted while the laboratory was inspected and cleaned (*id.* at 8a-9a; *English* v. *Whitfield*, 858 F.2d 957, 959 (4th Cir. 1988)).

On March 15, 1984, respondent charged petitioner with a knowing failure to clean up contamination, and temporarily reassigned her to other work (Pet. App. 2a, 9a). On April 30, 1984, management informed her that she would be laid off unless she successfully bid within 90 days for a position in an area of the facility that did not involve exposure to nuclear materials (*id.* at 10a). On May 15, 1984, petitioner was notified of the final company decision affirming this disciplinary action (*English* v. *Whitfield*, 858 F.2d at 959). When petitioner had not found another position by July 30, 1984, her employment was terminated (*id.* at 960).[2]

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[1] Although petitioner made similar complaints over the years (Pet. 6), this action appears to be based solely on events occurring in 1984 (Pet. App. 2a, 7a-8a).

[2] Technically, petitioner was placed on layoff status on July 30, and thus retained certain benefits and recall rights (see Br. in Opp. 2 n.1). See also *English* v. *Whitfield*, 858 F.2d 957, 960 n.1 (4th Cir. 1988). As a practical matter, however, she was no longer employed by respondent after July 30, 1984.

2. On August 24, 1984, petitioner filed a complaint with the Secretary of Labor under Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851, alleging that respondent's actions constituted unlawful employment discrimination in retaliation for her complaints about nuclear safety violations (Pet. App. 3a n.2, 31a). An administrative law judge found that respondent violated the ERA when it transferred and then discharged petitioner (*id.* at 30a-56a), but the Secretary dismissed the complaint as untimely because it had not been filed within 30 days after the May 15 notice of the final company decision (see Section 5851(b)(1)). *English* v. *General Electric Co.*, No. 85-ERA-2 (Jan. 13, 1987). The Fourth Circuit affirmed the dismissal of petitioner's allegations of unlawful transfer and discharge, but remanded for consideration of her claim that she was subjected to retaliatory harassment after May 15, and that this harassment constituted a continuing violation. *English* v. *Whitfield*, *supra*. On remand, the ALJ also dismissed that claim. *English* v. *General Electric Co.*, No. 85-ERA-2 (Recommended Decision and Order Apr. 5, 1989). That decision is currently pending before the Secretary.

3. On March 13, 1987, petitioner filed this action against respondent in federal district court. Petitioner alleged that she had been terminated in violation of the public policy evidenced in federal nuclear safety laws and that she was suffering from severe depression and emotional difficulties as a result of the employer's "intentional, malicious, extreme and outrageous conduct" (Pet. 8; Pet. App. 6a, 11a). In addition to challenging her employer's actions in transferring and ultimately firing her, petitioner alleged that respondent: (1) removed her from the laboratory position under guard "as if she were a criminal"; (2) assigned her to degrading "make work" in her substitute assignment; (3) derided her as "paranoid"; (4) barred her from working in controlled areas; (5) placed her under constant surveillance during work

hours; (6) isolated her from co-workers, even during lunch periods; and (7) conspired to charge her fraudulently with violations of safety and criminal laws (Pet. App. 27a). The complaint requested $1,328,645 in compensatory damages and approximately $2.3 billion in punitive damages (*id.* at 6a).

The district court granted respondent's motion to dismiss, concluding that petitioner's wrongful discharge and emotional distress claims were preempted by the whistleblower protection provisions of 42 U.S.C. 5851, and alternatively that she had failed to state a valid cause of action for wrongful discharge under North Carolina law (Pet. App. 6a-29a). The court first rejected the company's arguments that Section 5851 regulates matters of nuclear safety—a field preempted by the federal government—and that petitioner's complaint concerned matters in that preempted field (*id.* at 17a, 18a). But it held (*id.* at 19a-23a) that three aspects of that statute nevertheless manifest a pervasive, comprehensive federal scheme that would be frustrated by pursuit of state law remedies: (1) the provision barring recovery by any employee who "deliberately causes a violation of any requirement of [the ERA] or of the Atomic Energy Act" (42 U.S.C. 5851(g)); (2) the absence of any provision for exemplary (or punitive) damage awards by the Secretary of Labor (42 U.S.C. 5851(b)(2)(B));[3] and (3) the requirement that whistleblowers file their administrative complaints within 30 days after the violations occur, and that the Secretary resolve such complaints within 90 days after filing (42 U.S.C. 5851(b)(1) and (2)(A)). As the court perceived it, Congress enacted these provisions to obtain speedy resolution of nuclear safety concerns, to

[3] The statute does, however, provide for recovery of exemplary damages in civil actions brought by the Secretary to enforce her remedial orders in district court. See 42 U.S.C. 5851(d) (district courts "have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages").

limit exemplary damage awards against the nuclear industry, and to preclude reinstatement and compensation of employees who violate nuclear safety requirements—goals that are incompatible with the broader remedies available under state tort law (Pet. App. 21a-22a). Because the only claims in petitioner's complaint related to retaliatory actions affecting her "terms, conditions, or privileges of employment," matters cognizable under Section 5851, the court concluded that it lacked subject-matter jurisdiction over the action (Pet. App. 28a-29a).[4]

In a per curiam opinion, the Fourth Circuit affirmed the dismissal of petitioner's emotional distress claim for the reasons stated by the district court (Pet. App. 1a-3a).[5] The court of appeals rejected petitioner's argument that Congress did not intend to foreclose whistleblowers from pursuing state tort remedies, and concluded that the district court "correctly identified and applied the relevant federal and state law" (*id.* at 3a).

DISCUSSION

In holding that petitioner's claim for intentional infliction of emotional distress is preempted by the ERA, the court of appeals has misread Congress's intent in enacting whistleblower protection for nuclear industry employees. Moreover, the Fourth Circuit's decision squarely conflicts with the decision of the First Circuit in *Norris* v. *Lumbermen's Mutual Casualty Co.*, 881 F.2d 1144 (1989). In our view, certiorari should be granted

[4] The court alternatively held that petitioner failed to state a cause of action for wrongful discharge, because North Carolina law does not recognize the tort of wrongful discharge absent a specific duration employment contract, the giving of additional consideration for protected tenure, or a discharge for refusing to give perjured testimony (Pet. App. 24a-25a). The court concluded that petitioner had stated a valid state law claim for intentional infliction of emotional distress (*id.* at 26a-27a).

[5] Petitioner did not appeal the dismissal of her wrongful discharge claim, and that claim is accordingly no longer at issue.

to resolve this conflict over the proper interpretation of a significant federal statute.

1. Contrary to the conclusion of the courts below, the ERA does not preempt an employee's state cause of action for intentional infliction of emotional distress resulting from retaliation for making nuclear safety complaints. The Fourth Circuit's analysis of the preemptive effect of Section 5851 is unsound both as a matter of statutory interpretation and because it overlooks the strong presumption against federal preemption in areas of traditional state concern.

a. Pursuant to the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, Congress may preempt state law in several ways. See *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 153 (1982); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). First, Congress can provide expressly that federal law be given preemptive effect. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, among other statutes, provides a familiar example. See 29 U.S.C. 1144. Absent explicit statutory language, intent to preempt can also be found in a "scheme of federal regulation * * * * so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. at 153, quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. at 230. Preemptive intent can also be found in an Act of Congress that "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or in cases where "the object sought to be obtained by the federal law and the character of obligations imposed by it" support the same assumption. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. at 230; accord *Schneidewind* v. *ANR Pipeline Co.*, 108 S. Ct. 1145, 1150-1151 (1988). But cf. *De Canas* v. *Bica*, 424 U.S. 351, 359-360 (1976). In addition, state law is preempted to the extent that it actually conflicts

with federal law, *i.e.*, where it is impossible to comply with both federal and state law (see *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963)). Finally, preemption also lies where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

In preemption inquiries, "[t]he purpose of Congress is the ultimate touchstone." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 747 (1985); *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978). By virtue of important and sensitive federalism concerns, it is presumed that Congress ordinarily does not intend to displace existing state legislative authority, and "[w]here * * * the field which Congress is said to have pre-empted has been traditionally occupied by the States," the intent of Congress to supersede state laws must be "clear and manifest." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). Cf. *Savage* v. *Jones*, 225 U.S. 501, 533 (1912) (state law is deemed to be in conflict with an Act of Congress only if the "purpose of the Act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect").

b. In light of these principles, the courts below erred in concluding that Section 5851 preempts petitioner's claim of intentional infliction of emotional distress. Nothing in the statute's language or legislative history provides "clear and manifest" evidence of congressional intent to create an exclusive remedy for nuclear industry whistleblowers. Moreover, the availability of state remedies will not frustrate, and may even further, the congressional objective in Section 5851 of promoting the safe use of nuclear energy.

Section 5851 does not, of course, contain an express preemption provision. Nor can preemption be implied either from the existence of a federal remedy or from any of the specific factors considered by the courts below.

In the first place, the mere existence of a federal remedy—even a rather comprehensive federal remedy—does not imply preemption of state remedies. As this Court has noted, "[u]ndoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. * * * Instead, we must look for special features warranting preemption." *Hillsborough County* v. *Automated Medical Labs., Inc.*, 471 U.S. 707, 719 (1985). Even where Congress has established a comprehensive regulatory or enforcement scheme, preemptive effect may not be inferred without specific indicia of legislative intent to exclude state activity in that field. See *Hillsborough County*, 471 U.S. at 717 ("merely because the federal provisions [a]re sufficiently comprehensive to meet the need identified by Congress d[oes] not mean that States and localities [a]re barred from identifying additional needs or imposing further requirements in the field"); *New York Dep't of Social Services* v. *Dublino*, 413 U.S. 405, 415 (1973) ("[t]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem"); cf. *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987) (preemptive effect of ERISA's "comprehensive" civil enforcement scheme is "fully confirmed" by its legislative history).

The precise basis for the result reached in this case by the courts below is not entirely clear.[6] In any event, however, they erred in relying on three particular aspects of the Section 5851 remedial scheme (*i.e.*, the bar to recovery by employees who intentionally violate requirements of the Atomic Energy Act and the ERA, the lack of any express provision for exemplary damage awards in the administrative proceedings, and the expeditious time frames for filing and adjudication of complaints). Neither the limited scope and forms of relief available under the federal statute nor the time limits imposed on proceedings thereunder are sufficient to indicate a congressional intent to eliminate alternative remedies under state law.

[6] The district court first indicated (Pet. App. 19a) that it was relying on conflict preemption, quoting *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). But after reviewing Section 5851 and its history, the court then stated that the statute created a "scheme of federal regulation * * * so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" (Pet. App. 22a-23a). The Fourth Circuit, which adopted the district court's reasoning (*id.* at 3a), did not elaborate on the matter.

Nothing in the legislative history supports the inference the courts below drew from those statutory limitations. The only discussion of those limitations by the responsible congressional committee was a statement that Section 5851(g) would deny relief to employees who deliberately violate nuclear safety requirements, "[i]n order to avoid abuse of the protection afforded *under this section.*" S. Rep. No. 848, 95th Cong., 2d Sess. 30 (1978) (emphasis added). Absent an indication of any broad aim to preclude *all* legal remedies otherwise available to such employees, it is "pure speculation" to read Section 5851(g) as evincing preemptive intent. *Gaballah* v. *PG & E*, 711 F. Supp. 988, 990 (N.D. Cal. 1989). Moreover, even if Congress had intended such a result, that fact alone would not suggest that state remedies should be denied to all whistleblowers protected by Section 5851. At most, subsection (g) would allow employers to assert a federal law defense in state law actions brought by employees excluded from Section 5851's protection. See *Norris* v. *Lumbermen's Mutual Casualty Co.*, 881 F.2d at 1150; *Gaballah*, 711 F. Supp. at 990.

Similarly, the absence of any authorization for exemplary damage awards by the Secretary under Section 5851 does not indicate an implied congressional intent to bar state actions that permit such awards. In the first place, Section 5851 apparently *does* authorize the award-

ing of exemplary damages in district court proceedings (see note 3, *supra*); its enactment thus was not based, as the district court believed, on "an informed judgment that *in no circumstances* should a nuclear whistle[] blower receive punitive damages when fired or discriminated against because of his or her safety complaints" (Pet. App. 22a (emphasis added)). More importantly, Congress's decision not to provide a given remedy may reflect the particular federal policy objectives addressed by the federal statute. Such policy choices do not themselves imply an intent to preclude other remedies under state law. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984); *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U.S. 656, 663-666 (1954); see also *California* v. *ARC America Corp.*, 109 S. Ct. 1661, 1667 (1989) ("[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law").

Finally, the expeditious time frames in Section 5851 indicate only that Congress wanted *federal* whistleblower complaints to be filed and resolved quickly. Although the courts below perceived the 30-day filing period as a means by which "the regulatory authorities may discover potential hazards and violations that might otherwise have gone undiscovered for an uncertain period of time" (Pet. App. 22a), nothing suggests that a safety rationale motivated Congress to prohibit other remedies merely because they might be invoked beyond the 30-day period.[7] Considering

[7] Neither the courts below nor the parties discuss another provision of Section 5851 that is arguably relevant to the preemption analysis. Section 5851(b)(1) requires the Secretary of Labor to notify the NRC "[u]pon receipt of * * * a complaint" under the statute—a mandate that has been implemented through a memorandum of understanding by which the two agencies agree "to cooperate with each other to the fullest extent possible" in all cases arising under Section 5851. 47 Fed. Reg. 54,585 (1982). As a result, the NRC is informed of any allegations of whistleblower discrimination, thus enabling that agency to address the underlying safety complaints and to impose its own sanctions on employers who retaliate against whistleblowing employees. See 10 C.F.R. 50.7. Because Section 5851 protects employees who are "about to commence," "about to testify," or "about to assist or participate" in an NRC proceedings, and even protects employees who file only internal safety complaints with their employer (see note 14, *infra*), its notification requirement enables the NRC to learn of incipient safety complaints that might otherwise be concealed as a result of employer retaliation.

Although this provision suggests that Congress intended the Section 5851 scheme to serve a notification function, we do not believe that Congress intended to preempt state law remedies merely because state actions might not provide notice of the underlying safety issues to the NRC. The brief notification requirement plainly is not a central focus of the statute. Apart from its sponsor's observation that the information provided "would be most relevant to the Commission," 124 Cong. Rec. 29,771 (1978) (remarks of Sen. Hart), the legislative history does not mention the provision, let alone explain its purpose. It is logical to assume that Congress, while interested in prompt notice of safety problems, primarily intended Section 5851 to promote whistleblowing activity by protecting employees against retaliation for their safety complaints—a purpose that might be achieved more fully by permitting such employees access to the potentially broader remedies available under state law.

the potential difficulties of complainants in complying with this short time limit, it is more reasonable to assume that Congress viewed the federal statute as supplementing, not supplanting, any state remedies that might exist. See *Gaballah* v. *PG & E*, 711 F. Supp. at 990.

In sum, none of the aforementioned features of Section 5851 supports the conclusion that Congress intended that statute "to constitute the sole remedy for nuclear facility emloyees who allege discrimination resulting from safety complaints" (Pet. App. 3a). Nor do those features show that Section 5851 reflects federal policy objectives that cannot be reconciled with the existence of alternative, broader remedies under state law. They thus fall well short of the requisite "clear and manifest" evidence of congressional intent to establish preemption of a state tort claim, the existence of which reflects the State's conclusion that it has "a substantial interest in regulation of

the conduct at issue." *Farmer* v. *United Brotherhood of Carperters*, 430 U.S. 290, 302-303 (1977).[8]

c. The courts below correctly rejected respondent's argument (Br. in Opp. 8-10) that a state law emotional distress claim alleging retaliation for employee safety complaints is preempted in the nuclear field because the sole purpose of such an action is to ensure nuclear safety. As the district court recognized (Pet. App. 17a), that argument fails to acknowledge the valid compensatory purposes served by state actions of this type.

It is well established that Congress has occupied the field of nuclear safety regulation, apart from certain limited powers expressly ceded to the States. See *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 212 (1983). However,

[8] We note that some or all of the remedial limitations on which the courts below relied for the preemption finding are also found in six other whistleblower protection statutes. See Toxic Substances Control Act, 15 U.S.C. 2622; Federal Water Pollution Control Act, 33 U.S.C. 1367; Safe Drinking Water Act, 42 U.S.C. 300j-9(i); Resource Conservation and Recovery Act, 42 U.S.C. 6971; Clean Air Act, 42 U.S.C. 7622; Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9610. Unlike Section 5851, each of those whistleblower provisions exists in a statutory framework that permits state regulation of the subject matter of the protected whisleblowing. See, *e.g.*, 42 U.S.C. 7416 (preserving, in Clean Air Act, residual state authority to adopt and enforce air pollution standards). It is therefore unlikely that Congress, in placing substantive and procedural limits on the federal remedy in those contexts, meant to foreclose state law remedies for employees who suffer retaliation for assisting in the administration of a cooperative federal-state program. See *Willy* v. *Coastal Corp.*, 855 F.2d 1160, 1167 n.10 (5th Cir. 1988) (observing that "[t]he states * * * are traditional partners with the federal government in the field[] of * * * environmental regulation," and that a state wrongful discharge action brought by an environmental whistleblower "does not appear to directly conflict with any federal remedy"). Indeed, preemption would be particularly inappropriate under the two statutes that extend protection to whistleblowers who assist in *state* proceedings. See 42 U.S.C. 300j-9(i)(1) (Safe Drinking Water Act); 42 U.S.C. 9610(a) (CERCLA).

this exclusive federal authority does not include regulation for non-safety purposes. See, *e.g.*, Atomic Energy Act, 42 U.S.C. 2021(k) ("[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards"). As this Court has explained, the test for whether state law falls within an established field of preemption is "whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" *Pacific Gas & Elec.*, 461 U.S. at 213 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. at 236). In the nuclear safety context, state action is not prohibited where it is motivated, at least in part, by economic or other concerns unrelated to nuclear safety. See 461 U.S. at 212-216.

Despite respondent's portrayal of the claim for damages as an attempt to discourage employer conduct relating to nuclear safety, petitioner is seeking recovery based only on common-law tort principles that bar the intentional infliction of emotional distress; the state cause of action does not reflect any state policy specifically concerning nuclear safety complaints. To an even greater extent than the moratorium on nuclear power plant construction upheld in *Pacific Gas & Electric*, an emotional distress action in this context has a basis in social and economic policy that saves it from preemption.

This is true even though Section 5851, which also provides a remedy for the kind of harassment alleged in this case, was conceived as part of the federal scheme for regulating nuclear safety. See *Brown & Root, Inc.* v. *Donovan*, 747 F.2d 1029, 1033 (5th Cir. 1984) ("section 5851 is primarily designed to serve the major purposes of the ERA, in this case, nuclear safety"); S. Rep. No. 848, *supra*, at 29 ("[u]nder this section, employees and union officials could help assure that employers do not violate requirements of the Atomic Energy Act"). And it is true even though the "economic aspect of the state law may induce an employer to investigate a whistle blower's com-

plaints rather than fire her." *Norris* v. *Lumbermen's Mutual Casualty Co.*, 881 F.2d at 1151.[9]

d. Preemption is not required in order to implement any federal policy. There is no reason to believe that permitting state causes of action would either interfere with the Secretary's authority to adjudicate Section 5851 complaints or would otherwise frustrate the remedial goals of that Act. As this case demonstrates (see p. 3, *supra*), the adjudication of Section 5851 complaints can proceed independently of any state law proceedings.[10] And continued access to state remedies helps achieve Congress's primary goal by providing an additional, and possibly at times more effective, means of deterring employer misconduct that might otherwise impede the NRC's ability to resolve nuclear safety problems.

Nor is it significant that Section 5851 is associated with a federal regulatory scheme that preempts state

[9] Because petitioner did not appeal from the dismissal of her wrongful discharge claim, this Court need not consider whether such a claim would be preempted by Section 5851. A complaint alleging wrongful termination in violation of the public policy evidenced in federal nuclear safety laws might raise a more difficult preemption issue than that presented here. See *Pacific Gas & Elec.*, 461 U.S. at 213. But cf., *e.g.*, *Stokes* v. *Bechtel N. Am. Power Corp.*, 614 F. Supp. 732, 741-742 (N.D. Cal. 1985) (wrongful discharge claim based on public policy unrelated to nuclear safety concerns is not preempted). Even a cause of action based on a purpose of encouraging nuclear safety complaints may not be preempted if the state's recognition of such a remedy also furthers a policy of compensating the victims of unfair employment practices or some other social or ecoomic objective. See *Norris* v. *Lumbermen's Mutual Casualty Co.*, 881 F.2d 1144 (1st Cir. 1989) (concluding that wrongful discharge claim is not preempted), discussed pp. 15-17, *infra*.

[10] See *Greenwald* v. *City of North Miami Beach*, 587 F.2d 779 (5th Cir.), cert. denied, 444 U.S. 826 (1979) (holding that the analogous whistleblower remedy in the Safe Drinking Water Act is "entirely independent of any local remedies," and that such remedies need not be exhausted prior to the filing of a complaint with the Secretary).

law in other respects. As we have explained, the preemptive effect of the Atomic Energy Act and related statutes is limited to the field of nuclear safety regulation; thus, any state law action that serves non-safety purposes falls outside the area of exclusive federal authority.[11] Moreover, in rejecting assertions of preemption of state actions that have a more direct impact on federally regulated activities than exists here, this Court in *Pacific Gas & Electric* and *Silkwood* recognized that Congress is willing to tolerate the operation of state laws that have only incidental regulatory consequences in the nuclear safety domain. See also *Goodyear Atomic Corp.* v. *Miller*, 108 S. Ct. 1704, 1712 (1988) (an increased state workers' compensation award for injury caused by a safety violation at a government-owned nuclear facility is an "incidental regulatory pressure" that Congress finds acceptable). Therefore, even though state remedies for nuclear whistleblowers may also advance federal safety interests, it is appropriate, in the absence of any evidence of a contrary legislative purpose, to assume that Congress intended to permit the incidental consequences of those remedies in addition to the federal sanctions.

2. The decision below directly conflicts with the reasoning and result in *Norris* v. *Lumbermen's Mutual Casualty Co.*, *supra*. In *Norris*, the First Circuit expressly recognized the conflict (881 F.2d at 1148, 1150), and

[11] Similarly, the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, which preempts state regulation of workplace safety and health with respect to matters governed by a specific federal standard, does not preempt state law remedies for employees who suffer employment discrimination on account of their having filed complaints, testified or otherwise exercised rights under the Act, even though the Act itself provides a federal remedy for the same employer conduct (29 U.S.C. 660(c)). See *Le Pore* v. *National Tool & Mfg. Co.*, 224 N.J. Super. 463, 540 A.2d 1296 (1988), aff'd, 115 N.J. 226, 557 A.2d 1371, cert. denied, 110 S. Ct. 366 (1989); accord *Kilpatrick* v. *Delaware County Society for Prevention of Cruelty to Animals*, 632 F. Supp. 542, 547-550 (E.D. Pa. 1986).

disagreed with the holding in this case. The *Norris* court concluded that neither the statutory language nor the legislative history of Section 5851 indicates congressional intent to preclude state law remedies. *Id.* at 1147-1151.[12]

Contrary to respondent's position (Br. in Opp. 20-22), the disagreement on the preemption issue between the Fourth and First Circuits is unmistakable. It cannot be avoided by highlighting, as respondent attempts to do, certain differences between the two cases. Although *Norris* involved a wrongful discharge claim, whereas the decision below involves an emotional distress claim, the differing results in the cases cannot be explained away on that basis. Indeed, the district court here found that both petitioner's wrongful discharge claim and her emotional distress claim were preempted on identical grounds.[13] Thus, even though the Fourth Circuit considered preemption under Section 5851 only with respect to an emotional distress claim, the preemption analysis it adopted would apparently lead to the same result in a wrongful discharge claim. See note 9, *supra*.

Nor is it significant that, unlike petitioner, the employee in *Norris* had made only internal safety complaints[14] and was not himself accused of any nuclear safety violation,[15] or that the employer in *Norris* was a contractor that did not operate a nuclear facility (see Br. in Opp. 21-22). Neither decision turned on whether the employee's conduct was actually protected under federal law; indeed, in their discussion of the preemption question, both courts assumed that Section 5851 would cover the alleged whistleblower activity.[16]

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[12] The district courts have also reached divergent results on whether state law actions brought by nuclear whistleblowers are preempted. Compare *Snow* v. *Bechtel Constr., Inc.*, 647 F. Supp. 1514 (C.D. Cal. 1986) (state remedies preempted), with *Gaballah* v. *PG & E*, *supra* (state remedies not preempted), and *Stokes* v. *Bechtel N. Am. Power Corp.*, 614 F. Supp. 732 (N.D. Cal. 1985) (same). The state courts are also in disagreement. Compare *Chrisman* v. *Philips Industries, Inc.*, 242 Kan. 772, 751 P.2d 140 (1988) (state remedies preempted), with *Wheeler* v. *Caterpillar Tractor Co.*, 108 Ill. 2d 502, 485 N.E.2d 372 (1985) (state remedies not preempted), cert. denied, 475 U.S. 1122 (1986), and *Field* v. *Philadelphia Elec. Co.*, 565 A.2d 1170 (Pa. Super. Ct. 1989) (same). Cf. *Norman* v. *Niagara Mohawk Power Corp.*, 873 F.2d 634 (2d Cir. 1989) (Section 5851 provides exclusive federal remedy).

[13] For purposes of determining that Section 5851 of the ERA preempts state law remedies, the district court treated petitioner's emotional distress claim as indistinguishable from her wrongful discharge claim since both claims alleged conduct cognizable under Section 5851. Pet. App. 23a-24a, 28a-29a. See also *English* v. *Whitfield*, 858 F.2d 957, 963-964 (4th Cir. 1988) (citing *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), for the proposition that retaliatory harassment sufficiently onerous to create a "hostile work environment" violates Section 5851).

[14] There is some disagreement over whether internal safety complaints constitute protected activity under Section 5851. Three courts of appeals have expressly or impliedly agreed with the Secretary of Labor that they do. *Kansas Gas & Elec. Co.* v. *Brock*, 780 F.2d 1505 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986); *Mackowiak* v. *University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984); *Consolidated Edison Co.* v. *Donovan*, 673 F.2d 61 (2d Cir. 1982); but see *Brown & Root, Inc.* v. *Donovan*, 747 F.2d 1029, 1036 (5th Cir. 1984) (holding that "employee conduct which does not involve the employee's contact or involvement with a competent organ of government is not protected under section 5851"). The First Circuit in *Norris* found no need to resolve that dispute (see note 16 *infra*). Because petitioner presented her safety complaints to the NRC, that issue is not presented in this case.

[15] Although the First Circuit noted that Section 5851(g), which bars recovery for employees who deliberately violate federal nuclear safety requirements, presented only "a speculative conflict" with state law remedies because the plaintiff in that case had not been accused of any such violation, see 881 F.2d at 1150, the court also observed that any bar on recovery imposed by Section 5851(g) "would be available to a defendant as a federal law defense in state court." *Ibid.* Thus, the court appeared to reject the view of the courts below that the purposes of subsection (g) would be frustrated by the very existence of a state law action (see Pet. App. 19a-21a).

[16] For example, the *Norris* court stated that there was no need to consider whether internal complaints are covered by Section 5851,

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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because that provision does not preempt state law remedies. 881 F.2d at 1146.

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